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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL GOMEZ,

Defendant and Appellant.

B203172

(Los Angeles County
Super. Ct. No. LA039050)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Darlene E. Schempp, Judge. Affirmed and remanded.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Lance E. Winters and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff
and Respondent.

Jose Manuel Gomez appeals from the judgment entered following a jury trial in which he was convicted of two counts of second degree robbery, counts 2 and 7 (Pen. Code, § 211), with the finding as to each that he personally used a handgun within the meaning of Penal Code section 12022.53, subdivision (b); criminal threats, count 3 (Pen. Code, § 422); assault with a semiautomatic firearm, count 4 (Pen. Code, § 245, subd. (b)); and burglary, count 5 (Pen. Code, § 459), each with the finding he personally used a handgun within the meaning of Penal Code section 12022.5, subdivision (a). Following a court trial, appellant was found to have served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b), a prior conviction of a serious felony within the meaning of Penal Code section 667, subdivision (a)(1), and a prior conviction of a serious or violent felony within the meaning of the “Three Strikes” law. (Pen. Code, §§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i).) Appellant was sentenced to prison for a total of 31 years and contends the trial court erroneously sentenced him to a full consecutive term on the enhancement attached to count 4 rather than the one-third term required by Penal Code section 1170.1, subdivision (a). For reasons stated in the opinion, we remand the matter for resentencing and in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

During the evening on October 7, 2001, appellant entered Circus Liquor at the corner of Burbank and Vineland in the County of Los Angeles, went behind the register, and grabbed a firearm that was kept under the counter. As he walked out of the store, he pointed the gun at two of the store’s employees and told them not to follow him.¹

Appellant went to Anthony Garibaldi’s house, approximately four blocks away, and hit Mr. Garibaldi over the head with the gun causing his head to bleed. Mr. Garibaldi testified appellant stuck the gun in his face and clicked it several times, but the gun did not fire. Appellant was about one or two feet away and Mr. Garibaldi begged appellant

¹ Appellant had worked at Circus Liquor for a short time but had quit approximately one week before this incident.

to stop. Mr. Garibaldi wrestled appellant to gain control of the gun. Appellant escaped and was not arrested until 2006 in Idaho.

Previously, appellant had worked for Mr. Garibaldi and believed Mr. Garibaldi owed him money. Approximately one week before this incident, appellant, who was intoxicated, had gone to Mr. Garibaldi's house and threatened to kill Mr. Garibaldi over the money he was owed.

DISCUSSION

At sentencing, the court selected count 2 as the base term and sentenced appellant to the middle term of three years, doubled to six years by reason of the prior strike conviction, plus 10 years for the firearm enhancement. For count 3, appellant received a concurrent sentence of the middle term of two years, doubled to four, plus four years for the firearm enhancement. For count 4, appellant was sentenced to a consecutive term of one-third the middle term of six years or two years, doubled to four years, plus four years for the firearm enhancement. For count 5, appellant was sentenced to a concurrent sentence of the middle term of four years, doubled to eight years, plus a concurrent term of four years for the firearm enhancement. As to count 7, appellant was sentenced to a consecutive sentence of one-third the middle term of three years or one year, doubled to two years plus four years concurrent for the firearm enhancement.² Appellant was sentenced to an additional five years by reason of the prior serious felony enhancement found true within the meaning of Penal Code section 667, subdivision (a)(1). The prior prison term enhancement was stricken.

Appellant contends the trial court erroneously sentenced him to a full consecutive enhancement attached to count 4 rather than the one-third term required by Penal Code section 1170.1, subdivision (a). Respondent agrees and asserts the matter should be remanded for resentencing.

² Although not raised by the parties, it appears the court may have erred in imposing this enhancement on count 7 concurrently. Penal Code section 12022.5, subdivision (a) requires "an additional and consecutive term of imprisonment." Upon resentencing the court should also consider this element of the sentence.

Penal Code section 1170.1, subdivision (a) provides: “Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

The court selected count 2 as the principal term, and the sentence for count 4, as part of the subordinate term, should have included only one-third of the middle term for the firearm use enhancement. We agree with respondent, that the matter should be remanded for resentencing to allow the court to reconsider its entire sentencing scheme. “[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

DISPOSITION

The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.